



Current & Future Landscape of International Trade: What to Expect in 2022



Presented by **Adrienne
Braumiller & George Tuttle III**
December 14, 2021



Agenda

- CBP Forced Labor Enforcement - What it means for YOU
- Detangling Country of Origin Rules - Non-preferential Rules of Origin for Goods from Canada and Mexico
- What's New with Section 232 and 301 Trade Remedies - Will they ever go away?
- Customs Mod Act II - What the future might hold for YOU
- 2022 Revisions to the HTS (Time Permitting)

CBP Forced Labor Enforcement: What it means for YOU



CBP Forced Labor Prohibitions

19 U.S.C. § 1307: Prohibits Entry or Importation of Merchandise Produced by:

Slave labor

Prison/convict labor

Forced child labor

Indentured labor under penal sanctions

“All goods, wares, articles, and merchandise mined, produced, or manufactured *wholly or in part* in any foreign country by convict labor or/and forced labor ... shall not be entitled to entry ... and the importation ... is ... prohibited

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) removed the “Consumptive Demand Clause” enabling CBP to take action without regard to US production

CBP Forced Labor

Following investigation, CBP HQ issues a “Withhold Release Order” (“WRO”) for described products based on a “*reasonable indication*” that goods are made “*in whole or in part*” using “forced labor.”

What are WROs?

Internal instructions to all port directors to withhold release of merchandise similar to description into the U.S. pending instructions from HQ as to whether the merchandise may be released other than for export

Are *formal findings* the same as a WRO? See 19 CFR § 12.42(e)?

Scope of WRO








Named material as well as downstream products

Named supplier but may also designate an entire region or country

Forced Labor Enforcement Actions

Enforcement Actions

Forced Labor Statistics as of September 30, 2021* (published quarterly)

Total Active		FY 2021 Statistics	
	7 Findings		2 Findings Issued
	49 Withhold Release Orders		7 Withhold Release Orders Issued
			4 Withhold Release Orders & Findings Modified or Revoked
			1,469 Shipments Detained
			0 Penalties Issued

* The detention information provided above covers forced labor related detentions that occurred between October 1, 2020 and September 30, 2021.

- ❖ Check the [Withhold Release Orders and Findings List](#) for information on any merchandise that may be subject to exclusion and/or seizure. It is your obligation to be aware of your supply chain activities.

Recent WRO Actions

Silica-based products

- ❖ <https://www.cbp.gov/newsroom/national-media-release/department-homeland-security-issues-withhold-release-order-silica>
 - Applies to silica-based products made by Hoshine and its subsidiaries as well as to materials and goods (such as polysilicon) derived from or produced using those silica-based products.
 - The most common form of crystalline silica is **quartz**
 - **Polysilicon**, a high-purity form of silicon, is a key raw material in the solar photovoltaic (PV) supply chain.
 - Silica is a basic raw material used in the manufacturing of a wide variety of electronic goods, including semiconductors, printed circuit boards, batteries, solar panels, and virtually all consumer and industrial electronics.
 - The order **covers materials as well as final goods** derived from or produced using Hoshine's silica-based products, regardless of where the materials and final goods were produced.
 - <https://www.cbp.gov/trade/programs-administration/forced-labor/hoshine-silicon-industry-co-ltd-withhold-release-order-frequently-asked-questions>

Recent WRO Actions

❖ Xinjiang Uyghur Autonomous Region WRO (Cotton & Cotton products)

- The WRO was issued against cotton and downstream products produced in whole or in part from XUAR
- includes downstream products produced outside XUAR that incorporate these inputs
- Downstream products made in third countries that incorporate these inputs are subject to the WRO.
- Examples of covered products include apparel and other goods made with cotton.

WRO Process

❖ 19 CFR § 12.44

- export the merchandise to a location outside the United States within the **3-month detention period**
- detained shipment will be excluded from entry if:
 - importer fails to:
 - re-export the detained shipment or
 - timely furnish the required Certificate and Statement
 - CBP determines the **proof submitted by the importer** does not establish admissibility of the merchandise
- If not exported, goods will be **destroyed**
- CBP has informal guidance in its **Frequently-Asked-Questions** on the type of business documentation that can be submitted to support the origin of the goods or materials

Avoiding Importation of Forced Labor Goods

-
- ❖ Under **19 U.S.C. § 1484** importers are required to enter merchandise using **reasonable care** and to provide sufficient proof to allow CBP to determine admissibility.
 - ❖ **Supplier Vetting:** Request new suppliers to answer forced labor questionnaires, on-site visits, and sign certificates
 - ❖ **Contractual Protection:** Include forced labor terms and conditions in operations and sales contracts that requires that goods purchased in the supply chain be made without forced labor
 - ❖ **Supplier Audits:** Conduct periodic supplier audits for forced labor using independent auditors to ensure forced labor compliance
 - ❖ **Compliance Manual:** Maintain forced labor procedures for detainments and other CBP actions pursuant to WROs, including proof of admissibility statements and certificates of origin
 - ❖ CBP's 2017 Reasonable Care ICP 12 steps for compliance with Forced Labor prohibitions

Detangling Country of Origin Rules: Non-preferential Rules of Origin for Goods from Canada and Mexico



Country of Origin for Imports

- The country of origin is important for a number of reasons:
 - It must be **declared** on the invoice and entry
 - Many products – especially consumer goods – or their containers, must be **marked** with the country of origin
 - The **rate of duty** is dependent on the country of origin
 - The country of origin may trigger other requirements such as other agency requirements, AD/CVD, or Section Duties

Country of Origin for Imports

- There are two basic sets of country-of-origin rules that apply to imports:
 - 1) Traditional Substantial Transformation test under Part 134 for articles not **designated** under **Part 102**
 - 2) Origin rules provided under **Part 102** for articles considered “originating” from **designated** FTA countries (e.g., USMCA):
 - **USMCA** (on or after 7/06/2021); US -**Morocco** FTA and US -**Bahrain** FTA (**19 CFR 102.0**)
- Apparel and Textile Products under 102.21 **regardless of origin**

Origin for Mexico/Canada

- ↩ Importers make two separate origin determinations:
 - A) Origin for USMCA- Preferential duty treatment
 - B) **Marking** under Part 102.11 if goods USMCA eligible
 - 102.11(a) – Wholly obtained or produced; exclusively from domestic materials; or foreign material that undergoes an applicable **change in tariff classification** set out in § 102.20 (or RVC)
 - 102.11(b) origin of the **single material** that imparts the essential character
 - 102.11(c) a set or mixture, or classified as a set, mixture or composite good pursuant to GRI 3
 - 102.11(d) the country of origin of the good is the last country in which the good underwent production.
- ↩ See USMCA Marking final interim rules published 7/06/2021, 86 FR 35566

Origin for Mexico/Canada

- What if goods Qualifies under **USMCA** as originating but **some materials or inputs** come from **China**?
- Finished good is still subject to Section 301 duties if China inputs do not undergo **traditional Substantial Transformation**
- See HQ H318255, November 3, 2021; HQ H312891 dated October 14, 2021; and HQ H312859, dated August 5, 2021
- Section 301 duties assessed on full value of finished good if **Chinese** parts do not undergo **Substantial Transformation**

Origin for non-preferential Tariff Rate Purposes

- The country of origin for non-preferential purposes (including assessment of Section 301 duties is **traditional substantial transformation** test (19 C.F.R. Part 134).
- If articles are imported from Canada or Mexico **and do not qualify as USMCA goods**, what rule is applied?
- 19 C.F.R. Part 134 (**substantial** transformation test)
- But see Proposed Marking Rule: 86 FR 35422, dated 7/06/2021 (Non-Preferential Origin Determinations for Merchandise Imported From Canada or Mexico)

What's new with Section 232 and 301 Trade Remedies: Will they ever go away?



Section 232 Tariffs: Background

- On March 23, 2018, the Trump Administration implemented tariffs of 25% on imports of certain steel products and 10% on imports of certain aluminum products, as well as quotas.
- The 25% tariff on steel products applies to all countries of origin except Argentina, Australia, Brazil, Canada, Mexico, and South Korea. However, Argentina, Brazil, and South Korea are subject to absolute quotas.
- The 10% tariff on aluminum products applies to all countries of origin except Argentina, Australia, Canada, and Mexico. However, Argentina is subject to an absolute quota.

Recent Section 232 Litigation

- In the **Prime Source** cases, the CIT determined that the President did not have the authority to impose Section 232 Duties on steel and aluminum derivative products, such as wire, cable, fasteners, and bands.
 - The President did not act within 105 days of receiving the national security report from the Secretary of Commerce.
- In **Transpacific Steel**, the CAFC upheld the increase in Section 232 Duties on steel imports from Turkey, reversing the CIT's judgment that held they were illegal.
 - The Court found that the President did not violate the conferring statute in issuing Proclamation 9772, which increased steel tariffs on imports from Turkey.

Section 232: EU Agreement

- Joint US-EU Announcement of Actions on EU Imports Under Section 232 (November 2, 2021):
 - Tariff-rate quota (“TRQ”) for a fixed volume of EU imports to enter the United States free from Section 232 duties.
 - 232 Exclusions are automatically extended for U.S. exclusion holders and corresponding EU exporters for a period of two years (until 31 December, 2023).
 - The Joint Statement can be found on the [USTR’s website](#).

Section 232: BIS Final Rule

- ↩ Interim Final Rule published by the Bureau of Industry and Security modified the Section 232 Exclusion process.
 - 85 FR 81060 (Effective December 14, 2020) → Codified at 15 C.F.R. Part 705.
 - REVISED on December 9th, 2021
- ↩ Additionally, there are **82 General Approved Exclusions (GAEs)** for steel products and **11 GAEs** for aluminum products.
 - Can be used by any U.S. importer
 - No quantity limitations
 - No expiration date (indefinite)
 - E.g., GAE Steel Exclusion “GAE.6.S: 7212600000” covers products classified under HTSUS 7212.60.0000 that are flat-rolled iron or non-alloy steel with a width of less than 600 mm.
 - Commerce recently removed 26 steel GAEs and 4 aluminum GAEs via 86 FR 70003 (Dec. 9, 2021) based on comments from the industry.

Section 301 Tariffs on China: Background

- USTR and an interagency committee concluded that China's policies harmed the U.S. economy through technology transfers, investments, as well as administrative and licensing requirement, and industrial cyber espionage

- This resulted in Section 301 tariffs on China:
 - List 1 - \$34Billion - 25%Tariff
 - List 2 - \$16 Billion - 25% Tariff
 - List 3 - \$200 Billion - 25%Tariff
 - List 4A - \$300 Billion - 15% Tariff (prior to Feb. 14, 2020)
 - List 4A rate was reduced to 7.5% effective February 14, 2020
 - ❖ See [85 FR 3741](#) (Jan. 22, 2020)

Section 301 Litigation

- **In re Section 301 Cases** - current litigation challenging Lists 3 and 4A of the Section 301 Duties on goods from China in the CIT.
- Over 6,500 importers disputing close to billions of dollars in duties.
- Challenges:
 - 1) List 3 and List 4A violated the Trade Act;
 - 2) Violated the Administrative Procedure Act (APA) in promulgating List 3 and List 4A;
 - 3) The List 3 and List 4A Trade Actions is unconstitutional, and
 - 4) List 3 and List 4A violates the General Agreement on Tariffs and Trade.
- Importers are still paying the additional duties as the litigation unfolds.
- There is currently no litigation concerning Lists 1 or 2.

Reinstatement of 549 Section 301 Exclusions

- ↩ The USTR requested comments for the reinstatement of the Section 301 Exclusions that were extended
 - (See 86 FR 56345 on Oct. 8, 2021)
- ↩ Includes 549 Exclusions that were previously extended
- ↩ Comments period ended December 1, 2021 → **No definite timeline in sight for extension decisions**
- ↩ [COVID Exclusions](#): 81 Exclusions related to COVID-19 treatment are extended until May 31, 2022
 - (86 FR 63438 on Nov. 16, 2021)
- ↩ All other exclusions that were not extended are not being considered at the moment

Section 301 Exclusion Legislation

- The Trade Act of 2021 - bill passed the Senate and is currently waiting for review in the House.
- Would impose a statutory 301 Exclusion process, additional oversight, and additional requirements on the USTR.
- Would require the USTR to follow Congress's procedural guidelines for granting or denying exclusions for Section 301 duties on goods from China.
- Also provides for (1) Timeframe of exclusion requests and renewals; (2) audits of the exclusion process; and (3) reinstatement of expired exclusions.

Customs Mod Act II: What the future might hold for YOU



Customs Mod Act II

- ↪ First significant customs modernization legislation in **nearly 30 years**
- ↪ Draft bill provided on November 20
- ↪ CBP's 21st Century Customs Framework
- ↪ Affects treatment of trade data, entry filings, recordkeeping, penalties, intellectual property rights, forfeiture, and other areas
- ↪ **The Act would give CBP more enforcement authority, impose additional requirements on importers, and expand importer liability:**
 - Customs Mod Act II = Additional enforcement by

Trade Data

- ↩ CBP to collect additional information from additional parties, including information related to the sale, purchase, transportation, importation, or warehousing of a product through a “commercial or marketing platform” (defined by the Act):
 - A “commercial or marketing platform” is a platform, like a website or app, through which merchandise imported into the U.S. is offered for sale or purchase in the U.S. The (broad) language targets brick-and-mortar and e-commerce companies alike.
- ↩ CBP to utilize this information for any lawful purpose, including commercial enforcement
- ↩ Penalties for failing to provide trade data → **\$5,000** for the first violation and **\$10,000** for subsequent violations

Entry Filing

- All data related to entry, and a single entry filing of all data, to be **electronically filed** by the importer of record or its broker
- IOR or its agent to convert documentation or information submitted in advance of entry into an entry
- IOR or its agent to certify electronically-filed entry data
- CBP to utilize entry information for any lawful purpose, including commercial enforcement

Recordkeeping

- ↪ **Expands recordkeeping requirements** to additional parties that facilitate cross-border transactions, including those that
 - 1) submit, transmit, or otherwise make available or visible to CBP documentation or information under U.S. customs and trade laws or
 - 2) own or operate a commercial or marketing platform or marketplace through which imported goods are offered for sale or purchase

- ↪ Provides if a person fails to comply with a CBP demand for records CBP may use an inference adverse to that person's interests in
 - 1) ascertaining the correctness of any entry,
 - 2) determining the person's liability for fines, penalties, duties, fees, and taxes, and
 - 3) promoting compliance with U.S. laws

Penalties: Standards of Culpability

- ↩ **Modifies 19 U.S.C. 1592 by removing the gross negligence standard and redefining the standards for negligence and fraud**
- ↩ **Negligence** would mean the violation resulted from an act or omission done through the failure to exercise the degree of reasonable care to ensure statements made are complete and accurate or to perform a material act required by law.
- ↩ **Fraud** would mean if that the violation resulted from an act or omission done knowingly or with deliberate ignorance or reckless disregard of the offender's obligations to act in accordance with the law.

Penalties: Procedures

- ↩ **No pre-penalty notices for penalties of less than \$500,000**
 - Limits the administrative avenues for mitigation or cancellation
 - One step closer to litigation in the CIT
- ↩ Expands liability to any person that “directs or facilitates” the entry of merchandise for entry violations concerning declaration, arrival, reporting, or clearance requirements
 - Currently, anyone who “aides and abets” is liable
- ↩ CBP to issue penalties against violative trade actors that seek to intentionally spoil evidence or assets

IPR

- Expands permissions for CBP to publish information on intellectual property rights-related import violations that has been provided or shared by online marketplaces, e-commerce platforms, express consignments operators, freight forwarders, and other entities that facilitate imports
- Requires counterfeit imports or exports to be seized and, in **the absence of written consent of the owner of the mark** or copyright being infringed, summarily forfeited
- Challenges to **Section 337** exclusion order enforcement can only be filed with the International Trade Commission

Seizure & Forfeiture

- CBP to summarily forfeit items found in violation of the Food, Drug, and Cosmetic Act and other counterfeit goods
- Grants discretionary authority for the seizure of exports and excludes goods summarily forfeited from notice requirements

2022 Revisions to the Harmonized Tariff Schedule



Harmonized Tariff Schedule

- ↩ HTS → product nomenclature used in the tariff schedules of more than 200 countries/economies around the world.
- ↩ Every 5 years, the World Customs Organization (WCO) reviews the HTS
- ↩ The most recent review cycle concluded in 2019:
 - Seventh Edition HTS (2022)
 - Approximately 350 sets of amendments
 - Takes effect on January 1, 2022

Key 2022 Amendments

- ↩️ Environmental products
 - Including new provisions for e-waste (technology at the end of its useful life)
- ↩️ Electronics and Technologies
 - Smartphones
 - Drones
 - 3D Printers
 - E-cigs
 - Hybrid vehicles
- ↩️ Medical and Health related products – medical kits
- ↩️ Terrorism and controlled products – dual use

Questions

Adrienne Braumiller

Braumiller Law Group PLLC
5220 Spring Valley Road, Suite 200
Dallas, Texas 75254

Email: Adrienne@braumillerlaw.com

Web: www.braumillerlaw.com

George Tuttle III

Law Offices of George R. Tuttle, A.P.C.
3950 Civic Center Drive, Ste 310
San Rafael, CA 94903

Email: geo@tuttlelaw.com

Web: www.tuttlelaw.com